

The only Supreme Court case cited is clearly inapplicable to this case. First of all, Wardius v. Oregon, 412 U.S. 470 (1973) deals with a notice of alibi rule. No alibi has been claimed in this case. Secondly, Oregon required not only notice of the place claimed as an alibi.

but also the name and residence of any alibi witness upon whom the defense would rely. The Virginia Supreme Court Rule 3A-11 has no requirement that the defense provide notice of who the witnesses will be. Thus, all the discussion concerning witness location and lack of reciprocity is meaningless.

Contrary to the defense claim 3A:11 does not require the defense "to reveal important theories, tactics and witness locations". (See page 5 of the Memorandum) The defense need only disclose "the place at which he claims to have been at the time of the commission of the alleged offense". Rule 3A-11(c)(2). The United States Supreme Court decided long ago that "the privilege against self incrimination is not violated by a requirement that the defendant give notice of an alibi defense". Williams v. Florida, 399 U.S. 78, 81 (1970). The defense claim that Rule 3A:11 is facially unconstitutional is clearly not correct, and the Williams case makes it perfectly clear that the 5th amendment is not violated by an alibi notice statute. Thus the defense claim that Rule 3A-11 is unconstitutional as applied is equally incorrect.

Finally, the claim that the discovery rule is in conflict with the concepts of due process and fairness is sheer and utter nonsense. Among other things, the defense has been given the reports of every single expert who might be called by the Commonwealth; the tapes and transcripts of statements by the defendant and John Muhammad; the right to examine every piece of physical evidence that the Commonwealth might present; as well as hundreds of pages of other information in connection with the case. In addition they have 600 pages of the testimony of 24 commonwealth witnesses at preliminary hearing and all of the exhibits placed in evidence. All the while, the defense has provided virtually zero in reciprocal discovery as provided for in the rule. It would be zero, except for the notice of an insanity defense last Thursday (without the reports provided for in the rule). So much for the supposed "two way street".

The Commonwealth asks the Court to deny the motion in that it has no basis either in law or in fact.

Respectfully submitted,

ROBERT F. HORAN, JR
Commonwealth's Attorney

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Notice and Motion was mailed, postage prepaid, and faxed to Michael Arif, Counsel for Defendant, 8001 Braddock Road, # 105, Springfield, Virginia 22151 and Craig Cooley, Counsel for the Defendant, 3000 Idlewood Avenue, P.O. Box 7268, Richmond, Virginia 23221 this 16th day of October, 2003.

ROBERT F. HORAN, JR
Commonwealth's Attorney